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Supreme Court, U.S.
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No. 05-

In the
Supreme Court of the United States

SERENTE CISSE
Petitioner,

v.

STATE OF LOUSIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether there should be uniformity among the federal circuits and the state courts concerning the requirement that the alien defendant be fully informed and be made fully aware of the immigration consequences of his guilty plea.

II. Whether the Serente Cisse made an intelligent, voluntary, and knowing plea of guilty in conformity with this Honorable Court's requirement in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 109, 23 L.Ed. 2d 274 (1969).

III. Whether deportation for certain criminal offenses constitute cruel and unusual punishment in violation of the Eighth Amendment to the US Constitution.

IV. Whether Serente Cisse received effective assistance of counsel in conformity with the Sixth Amendment to the US Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

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OPINIONS BELOW

The decision of the Louisiana Supreme Court is reported as State vs. Serente Cisse, reported under No. 2005-K-0521. The decision of the Louisiana Court of Appeal, Third Circuit is unreported (State of Louisiana v. Serente Cisse, 04-1317 (La. App. 3rd Cir. 02/02/2005. The plea of Serente Cisse and sentencing of the 15th Judicial District Court for the Parish of Acadia, State of Louisiana is unreported. All three documents are reproduced in the appendix.

JURISDICTION

The decision of the Louisiana Supreme Court dated May 20, 2005, had denied the Petitioner's request for Writ of Certiorari. Petitioner files the instant application for a Writ of Certiorari to the U.S. Supreme Court under the authority of Rule 10 of this Honorable Court. This Honorable Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

1) This case addresses the conflict in the federal circuits concerning the issue of whether courts are required to fully advise alien defendants the immigration consequences inherent in their plea of guilty.

2) This case raises procedural due process issues under the Fifth Amendment to the United States Constitution and applicable to the States by the Fourteenth; of the right to trial by jury; and the right to confront one's accusers.

3) This case also presents the question of whether being removed from the United States for certain crimes constitute cruel, excessive and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

4) This case finally addresses the issue of Ineffective Assistance of Counsel in Violation of the Sixth Amendment to the US Constitution and made applicable to the States by the Fourteenth.

STATEMENT OF THE CASE

The Petitioner/Defendant, Serente Cisse (hereinafter "Petitioner" and/or "Defendant"), is a native of Mali and came the United States in 1989 under a family unification petitioned filed by his father. Because of economic difficulty in his family, Mr. Cisse had to quit school while he was in the sixth grade to help is father support the family. While he was in primary and secondary school, classes were taught in French and he was never exposed to the English language. After he came to the United States at the age of 19, he only had formal education of the English language for six months, and therefore, any English that he learned was learned in the streets. Mr. Cisse worked hard to establish a livelihood in Atlanta, Georgia.

On or about June 12, 1998, Mr. Cisse traveled to Houston to survey the job market to determine whether a move to Houston was feasible. While in Houston, he met a friend who asked him to transport a duffle bag for him to Atlanta. Without hesitation Mr. Cisse put the duffle bag into the trunk of his car and went back to Atlanta on June 19, 1998.

While traveling through Louisiana, Mr. Cisse was stopped in the Parish of Acadia by Deputy Gabe Fontenot of the Acadia Parish Sheriff's department for violating L.R.S. 32:0081–Following too Close. Officer Fontenot then asked Mr. Cisse to produce his driver's license and documentation in connection with the rental car that the defendant was driving and he complied. In the course of the interview, Deputy Fontenot ***ordered*** the defendant to open the trunk of his car and he did so as ordered. Deputy Fontenot then saw a duffle bag that belonged to the Mr. Cisse's friend in the trunk of the defendant's car, proceeded to unzip the bag, saw some plastic bags inside, tore open the plastic bags, and found marijuana. Before he performed the above acts, the deputy failed to obtain

oral or written consent from the defendant. Deputy Fontenot then arrested Mr. Cisse and charged him with Possession of Marijuana Over 60 Pounds with Intent to Distribute in violation of L.R.S. 40:0966. A bond was set at $45,000.00, which was posted by Mr. Joseph Harris to secure the defendant's release from jail.

Through counsel, who was then Mr. Kenny Privat, the defendant defense waived formal reading of the bill of information and entered a plea of not guilty. Mr. Kenny Privat then filed a motion to suppress the marijuana found in the trunk of the car alleging that the evidence was obtained in violation of Mr. Cisse's constitutional rights. The district judge, the Honorable Glennon Everett denied the motion, and subsequently, Mr. Privat sought writ with the Third Circuit Court of Appeals which denied the writ.

The case then laid dormant for many years, but subsequently it was set for trial on July 20, 2004. At about 9:00 a.m. on July 20, 2004, the court was called to order in the presence of prospective jurors with parties present and represented. Before the juror voir dire was to begin, Mr. Privat asked for conference in the judge's chambers with the Assistant District Attorney. Allegedly, negotiations for a plea bargain was made between the Assistant District Attorney and Mr. Kenny Privat in order to resolve this matter expediently. The plea bargain was rejected by Mr. Cisse because he feared immigration consequences. Mr. Kenny Privat then requested to withdraw as counsel for the defendant on the day of trial alleging that he could not adequately represent the defendant giving the fact that the defendant had given him conflicting stories of the factual circumstances in this matter. . This allegation was vehemently denied by the defendant. In conference Mr. Privat also revealed to the Court that Mr. Cisse has difficulty with the English language and could not

sufficiently understand the situation that was being transpired. The English difficulty was confirmed by the defendant. Subsequently, Judge Glennon Everett allowed Mr. Privat to withdraw as counsel for the defendant, and increased the defendant's bond to $300,000 to make sure that Mr. Cisse sits in jail until trial. Fearing that there be no one to take care of his family while he sits in jail, the defendant eventually changed his mind and accepted the plea.

Subsequent to his plea, the Department of Homeland Security ("DHS"), formerly known as the Immigration and Naturalization Ser .ce ("INS"), arrested Mr. Cisse and initiated removal proceedings against him. Detained in the INS detention Center at Oakdale, Louisiana, Mr. Cisse filed timely a Notice of Appeal to the Third Circuit Court of Appeal. Mr. Cisse the retained undersigned counsel who filed a brief on his behalf to the Third Circuit on November 8, 2004. On February 2, 2005, the Honorable Elizabeth A. Pickett of the Third Circuit denied Mr. Cisse's appeal, affirmed the ruling of the trial judge and remanded the case for resentencing. The Defendant the filed an Application for Writ of Certiorari to the Louisiana Supreme and was denied. This application for Writ of Certiorari to this Honorable Court then ensued.

REASON FOR GRANTING WRIT

I. CONFLICT BETWEEN THE STATES

In Louisiana, the possibility of being removed from the United States is a collateral consequence of a guilty plea which need not be explained as a requirement for a valid guilty plea. However, in contrast to Louisiana's unwillingness to take responsibility for insuring that alien residents knowingly and intelligently decide to plead guilty, numerous other States have taken the stance that requires judges to inform aliens of possible deportation consequences of their guilty plea.[1] This Honorable Court has recognized the need to fully inform aliens of immigration consequences in INS v. St.Cyr, 533 U.S. 289, 121 S.Ct. 2271, 2291 n. 48(2001).

Other State courts have also been willing, in the absence of statutes, to hold that a defendant cannot make a knowing and intelligent decision to plead guilty if unaware that deportation could result from such a plea. See e.g., People v. Padilla, 151 Ill. App. 3d 297, 104 Ill. Dec. 522, 502 N.E.2d 1182, 1186 (1986). A number of these States have made explicit findings that aliens are often unaware of deportation consequences when

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[1] See California, Cal. Penal Code § 1016.5; Connecticut, Conn.Gen. State. 54-1j; Florida, Fla. R.Crim. P. Rule 3.172; Georgia, Ga. Code Ann. § 17-7-93; Hawaii, Haw. Rev. Stat. § 802E-2; Maryland, Md. Rule 4-242; Massachusetts, Mass. Gen. L. ch. 278 § 29D; Minnesota, Minn. Rule Crim. Proc. 15.01; Montana, Mont. Code Ann. § 46-12-210, New Mexico, N.M. Cr. Form 9-406; New York, N.Y. Crim. Proc. Law § 220.50; North Carolina, N.C.Gen. Stat. § 15A-1022; Ohio, O.R.C. § 2943.031; Oregon, Or.Rev.Stat. § 135.385; Texas, Tex. Crim. Proc. Code Ann. § 26.13; Washington, Wash. Rev. Code Ann. § 10.40.200; Wisconsin, Wis. Stat. Ann. § 971.08, and the District of Columbia, D.C. Code 1981 § 16-713.

pleading guilty or nolo contendere and that fairness demands that aliens be made aware of such consequences.

II. CONFLICT BETWEEN THE FEDERAL CIRCUITS AND THE STATE COURTS OF LAST RESORT

In U.S. v. El-Nobani, 145 F.Supp.2d 906 (N.D. Ohio 2001), a legal permanent resident of the United States, after pleading guilty and sentenced to two years probation, sought to vacate his plea and to set aside his conviction because his plea was not knowing, voluntary and intelligent. The defendant in El-Nobani argued that his plea was not knowing, voluntary and intelligent because he was not aware that his plea would automatically lead to his deportation. These facts are similar to the case at bar in the sense that the Trial Court in the present case suspected that the plea might lead to some immigration consequence, and failed to fully ascertain the defendant's understanding of the matter.

Like the defendant in El-Nobani the Petitioner had certain knowledge that his plea may have immigration consequences, but he did not know that he would be summarily deported without hope of relief. The Court in El-Nobani held that the defendant's plea must be vacated as Rule 11 of the Federal Rules of Criminal Procedure requires district court judges warn alien defendants of the deportation consequences of their guilty pleas, and that the court was to make sure that the defendant understand such fact. The Court stated, "[s]ince the Court failed to warn El-Nobani and since he had no independent knowledge of those consequences, El-Nobani's plea must be vacated as it was not made knowingly, voluntarily, and intelligently." The Court in El-Nobani reasoned that prior to Congress dramatically altering the legal landscape of immigration law in 1996, legal alien residents who had

committed deportable offenses could apply for discretionary relief from deportation. However, the changes in immigration law in 1996 changed all that in the sense that presently there is virtually no relief from deportation when a legal alien resident pleads guilty to a deportable offense under what is termed in immigration law as an aggravated felony.[2]

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[2] The term "aggravated felony" has undergone through many changes and revisions since it was first introduced in the ADAA. The term reached its climatic impact with respect to permanent residents under the AEDPA and IIRAIRA. Now aggravated felonies include the following convictions, the list of which is not meant to be exhaustive:

I. Murder (INA § 101(a)(43)(A));
II. Crime of Violence for which a sentence of 1 year or longer has been imposed (INA § 101(a)(43)(F));
III. Demand for receipt of ransom ((INA § 101(a)(43)(H));
IV. Drug crimes ((INA § 101(a)(43)(B));
V. Theft offenses for which a sentence of 1 year or longer has been imposed ((INA § 101(a)(43)(G));
VI. Money laundering and related offenses for which the amount if over $10,000 ((INA § 101(a)(43)(D));
VII. Tax evasion ((INA § 101(a)(43)(M)(ii));
VIII. Gambling offenses for which a sentence of 1 year or longer was imposed ((INA § 101(a)(43)(J));
IX. Trafficking of vehicles with altered identification numbers for which a sentence of 1 year or longer was imposed ((INA § 101(a)(43)(R));
X. Offense involving fraud or deceit ((INA § 101(a)(43)(M)(I));
XI. Commercial bribery, counterfeiting or forgery ((INA § 101(a)(43)(R));
XII. False or fraudulent US passport for which a 1 year sentence has been imposed ((INA § 101(a)(43)(P));
XIII. Rape (INA § 101(a)(43)(A));
XIV. Sexual abuse of minor (INA § 101(a)(43)(A));
XV. Child pornography (INA § 101(a)(43)(I));

This ruling of the Court in El-Nobani of the Federal Sixth Circuit is in conflict with other federal Circuit Courts that have held that district court judges are not required to inform alien defendants of the deportation consequences of their pleas, because deportation is a collateral consequence of pleading guilty. See United States v. Gonzales, 202 F.3d 20 (1st Cir. 2000); United States v. Romeo-Vilca 850 F.2d 177 (3rd Cir. 1988); United States v. Campbell, 778 F.2d 64 (11th Cir. 1985); Kincade v. United States 559 F.2d 906 (3rd Cir. 1977); Michael v. United States 50 F.2d 461 (2nd Cir. 1974). In reaching this conclusion, these courts have generally replied on at least one of two propositions: 1) that deportation is not directly part of a defendant's punishment or sentence; and/or 2) that deportation is controlled y another agency over which the trial judge has no control.

However, as stated by the Court in El-Nobani, deportation is now a direct and inevitable consequence of a conviction for resident aliens in almost all specific cases in light of the dramatic changes in immigration law, which virtually eliminated any discretionary relief by the Department of Homeland Security in deportation/removal proceedings.

This Honorable Court has said that ". . . there is a clear

XVI. Prostitution business (INA § 101(a)(43)(K)(I));

XVII. Transportation for the purpose of prostitution (INA § 101(a)(43)(K)(ii));

XVIII. Unlawful possession of firearm (INA § 101(a)(43)(E)(ii) or (iii));

XIX. Unlawful trafficking of firearms, explosive materials or destructive devices (INA § 101(a)(43)(C));

XX. Alien smuggling (INA § 101(a)(43)(N));

XXI. Obstruction of justice, perjury, or bribery of a witness for which the underlying charge carries possible sentence of 2 years or more ((INA § 101(a)(43)(S)).

difference between facing possible deportation and facing certain deportation." INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271 (2001). "It can no longer be claimed that deportation is a consequence that will be determined by an agency outside of the trial court's control." U.S. v. El-Nobani, 145 F.Supp.2d 906, 914 (N.D. Ohio 2001). After all, the trial court's actions make deportation inevitable under the existing immigration law. To make matters worse, as provided above, the new immigration laws have gone so far as to surprisingly expand the definition of aggravated felony to include less serious and non-violent crimes that previously were not considered aggravated felonies, extending the application of this issue to numerous additional individuals.

In St. Cyr, supra, this Honorable Court stated that the class of aliens whose continued residence in this country has depended on their eligibility for discretionary relief from deportation is extremely large, and not surprisingly, a substantial percentage of their applications for relief have been granted. Considering the now automatic nature of deportation proceedings based on convictions, deportation can no longer reasonably be considered merely a collateral consequence of an alien's guilty plea. The holdings to the other federal Circuit Courts which conflict with the El-Nobani decision relied upon precedent that was derived at a time when an alien's conviction did not automatically trigger deportation.

This is obviously an important question of federal law that has not been, but should be, settled by this Honorable Court in order to promote uniformity. After all, even though some federal district courts believe that the law does not require a court to advise defendants of the immigration consequences of a plea for the plea to be considered knowing and voluntary, those same federal district courts, in practice, do advise defendants of the possibility that, if they are not citizens, their

conviction could lead to their deportation before accepting a guilty plea. In fact, the Court in U.S. v. Amador-Leal, 276 F.3d 511 (9th Cir. 2002), stated that although immigration consequences are a collateral consequence of a plea and the resulting conviction, and the district courts are not constitutionally required to warn defendants about potential removal in order to assure voluntariness of a plea, it does not mean that the district courts should not do so. The Court in Amador-Leal, expounded that:

> Many district judges comment in their Rule 11 Colloquy that a plea of guilty and resulting conviction may affect an alien's status in this county, and inquire whether the defendant understands the possible immigration consequence of his plea. Although not required by Rule 11 or due process, we commend this sort of dialogue for there is no question that immigration consequences of a conviction are important to aliens contemplating a plea.

This Honorable Court now has an opportunity to resolve the conflicts within and between the states and the federal circuits by adopting the simple solution of requiring court, state and federal, to advise defendants, and make sure that they understand, the immigration consequences of their guilty pleas in the colloquy between the courts and the defendants. This is the most reliable manner in which to protect the constitutional rights of this class of individuals, and the easiest solution to implement.

In INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271 (2001), this Honorable Court acknowledged that plea agreements involve a *quid pro quo* between a defendant and the government and that the potential for unfairness to permanent residents is significant and manifest. This is especially true if the resident alien considering whether to enter into a plea agreement with the government is not acutely aware, and/or does not understand, the immigration consequences of his conviction.

III. SERENTE CISSE'S GUILTY PLEA WAS NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED.

Before entering a guilty plea, the defendant must be advised of, and must waive, his constitutionally guaranteed right to a jury trial, right of confrontation, and right against compulsory self-incrimination. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 109, 23 L.Ed. 2d 274 (1969); State ex rel. Jackson v. Henderson, 260 La. 90, 255 So.2d 85 (1971). Even more importantly, however, the entry of a guilty plea must be knowing and voluntary on the defendant's part. State v. Nuccio, 454 So. 2d 93 (La. 1984); Kennedy v. Maggio, 725 F.3d 269 (5th Cir. 1984); State v. Hill, 714 So. 2d 814 (La. App. 2nd Cir. 1998). Due process dictates that a guilty plea be the voluntary choice of an informed accused. Advising the defendant of certain facts beyond the Boykin "triad of rights" bears on the knowing and voluntary nature of the plea. State ex rel. LaFleur v. Donnelly, 416 So. 2d 82 (La. 1982).

While an understanding of the triad of rights may amount to the acceptance of a guilty plea, it is also true that other factors may have a bearing on the validity of the plea. A mere recitation of rights does not always inure the intelligent and voluntary nature of the plea. See, e.g., State v. Galliano,

396 So. 2d 1288 (La. 1981); State v. Beatty, 391 So. 2d 828 (La. 1980); State v. Halsell, 403 So. 2d 688 (La. 1981).

It is important that the accused be aware of the consequences of entering a plea to the charges against him pursuant to a plea bargain agreement. This is necessary for the defendant to make an informed decision about whether to plea guilty under the circumstances. After all, the defendant may be far more concerned about the possibilities of having his freedom while on probation, then being concerned about any abstract right to confront his accusers at trial. The defendant may prefer the certainty surrounding a plea bargain agreement than the uncertainty of a trial on the merits to prove his innocence. In other words, a defendant may be willing to trade off his constitutional rights for the certainty of a plea bargain agreement. This trade off, however, is fair only if the defendant is given all of the necessary information required for him or her to make an informed decision.

The law is clear that compliance with the three-right articulation rule of State ex rel Jackson v. Henderson, supra, alone, is not the equivalent of a constitutionally valid guilty plea. A guilty plea which complies with the per se rule of Jackson, but which does not comply with Boykin's constitutional mandate that the plea must be entered knowingly and intelligently, is an invalid guilty plea.

First, Serente Cisse's plea was not voluntary. The record shows that his trial attorney withdrew as counsel of record on the date of the trial, and the Trial Judge threatened to have Mr. Cisse go on trial, even without an attorney, if an attorney were not found by the next trial setting. Moreover, the Trial Judge increased Mr. Cisse's bond from $45,000 to $300,000.00, thereby, making sure that Mr. Cisse would remain in jail while waiting for trial. Facing the prospect of being put into jail and to go on trial without an attorney, the Defendant

had no choice but to take the plea bargain. Thus, Mr. Cisse was coerced by the trial judge into taking the plea.

Second, the Defendant was not made fully aware by his counsel, the prosecutor, or the Court that he would certainly be subjected to removal proceeding by the DHS if the Defendant plead to the amended charge. The court minute entries only reveal that the INS would pick up Mr. Cisse within 48 hours. The Defendant did not have any personal knowledge or familiarity with the immigration laws of this Country at the time he was coerced into taking the plea.

As a result of his guilty plea, the Defendant was held at a federal detention center in Oakdale, Louisiana, and faced removal proceedings. If Mr. Cisse fully understood that he would be subjected to detention by the DHS and removed from the United States as a result of his conviction and sentence under the plea agreement, he certainly would not have plead guilty. Hence, his plea was not knowingly, voluntarily and intelligently entered. See State v. Jones, 398 So.2d 1049 (La. 1981).

The law provides that advising the defendant of certain facts beyond the Boykin "triad of rights" bears on the knowing and voluntary nature of the plea. State ex rel. LaFleur v Donnelly, 416 So.2d 82 (La. 1982). Clearly, Serente Cisse could not have made a knowing and voluntary decision to enter into a plea agreement that would, without doubt, automatically lead to his deportation, if he was not first advised of that fact.

This case clearly shows that other factors do have a bearing on the validity of a plea because a mere recitation of rights to Serente Cisse did no inure the intelligent and voluntary nature of his agreement to the plea bargain. Considering his immigration status, it was important to Serente Cisse that he be made aware and fully understood the immigration consequences of entering a plea of guilty to the charge against him pursuant

to the relevant plea bargain agreement. This was necessary for the Petitioner to make an informed decision about whether to plead guilty under the circumstances and forego, or waive, his constitutional rights in the process. Surely, the Petitioner would not have entered the plea if he had known that certain deportation was sure to follow. A defendant must be made aware, he must fully understand, and he must not be coerced before that defendant can make an informed decision to plea guilty under any plea agreement, waiving his or her constitutional rights.

Serente Cisse's guilty plea was not intelligently, voluntarily and knowingly entered as contemplated by this Honorable Court in Boykin v. Alabama, supra. After all, Serente Cisse was coerced and he lacked fully the understanding and the relevant information which would have factored into his decision of whether to enter the guilty plea. Serente Cisse's knowledge, understanding, and free choosing is important to the question of whether his plea was knowingly, voluntarily and intelligently entered.

In State v. Jones, 404 So.2d 1192 (La. 1981), the Louisiana Supreme Court stated that a guilty plea is not valid unless the accused has a full understanding of what the plea connotes and of its consequences. The Louisiana Supreme Court, in Jones, went on to say that ". . . a waiver is valid only if voluntarily and knowingly made" and that "[t]he constitutional validity of the plea is ultimately determined y the overall circumstances of each case." The Louisiana Supreme Court, in State v. Richard, 769 So.2d 1177 (La. 2000), also stated that ". . . the validity of any guilty plea depends upon the circumstances of each case." Here, the overall circumstances show that Serente Cisse's pleas was not intelligent, knowing, or voluntary.

IV. DEPORTATION IS A FORM OF PUNISHMENT, AND SHOULD BE RULED AS EXTREME AND CRUEL FOR MANY CRIMES THAT ARE TERMED "AGGRAVATED FELONIES" IN VIOLATION OF THE EIGHT AMENDMENT TO THE US CONSTITUTION.

US District Court succinctly states in U.S. v. El-Nobani, 145 F.Supp.2d 906 (N.D. Ohio, 2001), "the fact that deportation consequences are often of far greater concern for legal aliens than any prison sentence they might receive." Although deportation is technically not a punishment, it is well recognized that this distinction is technical in nature but not in practicality, and that deportation is a punishment that must be considered.[3] Further, as stated in El-Nobani, while it can be said that deportation is not directly part of a defendant's sentence, deportation clearly has every other quality of a punishment, in light of the changes in immigration law. ". . . [D]eportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation." Jordan v. DeGeorge, 1 S.Ct. 703, 714 (1951). "Indeed, as already discussed, deportation is often

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[3]See e.g., Galvan v. Press, 347 U.S. 522, 531 S.Ct. 737, 98 L.Ed. 911 (1954) (commenting that the "intrinsic consequences of deportation are so close to punishment for crime"); Fong Yue Ting v. United States, 149 U.S. 698, 740, 13 S.Ct. 1016, 37 Le.Ed. 905 (1893) (Brewer J., dissenting) ("Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that often times most severe and cruel."); and Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433 (1948) (deportation is "a penalty" and "a drastic measure and at times the equivalent of banishment or exile.").

a more severe punishment than any sentence imposed by the Court and, since deportation is now automatic for a whole host of minor crimes, it will likely be a significantly harsher punishment than the judge's sentence in many, if not most, cases in the future." U.S. v. El-Nobani, supra.

Therefore, holding that deportation is not a direct consequence of conviction, solely on the basis that it is technically not a punishment imposed by the court, is a semantical parsing of form over substance. After all, "[d]eportation can be equivalent of banishment or exile. The stakes are indeed high and momentous for the alien who has acquired residence here." Delgadillo v. Carmichael, 68 S.Ct. 10 (1947). As this Honorable Court has poignantly stated: ". . . [D]eportation . . . visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty–at times a most serious one–cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." Bridges v. Wixon, 326 U.S. 135, 154 (1945).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment and Fourteenth Amendment of the United States Constitution guarantee the defendant in a state criminal proceeding assistance of counsel for his defense. This Honorable Court has held that the right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). In outlining the convicted defendant's burden of proof in an ineffective assistance case, this Honorable Court has established a two-part test. The first prong of the test examines whether the attorney violated some duty to the client. The second prong

of the test requires a showing of prejudice, resulting from defense counsel's deficient performance, without which the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In this case, Serente Cisse's trial counsel was only interested in him taking the plea. He withdrew as counsel on the day of trial when Serente Cisse did not want to take the plea. Because of this withdrawal, and the prospect of spending an indefinite amount of time in jail waiting for trial, Serente Cisse was ultimately coerced into taking the plea even though he vaguely understood that his action may bring adverse immigration consequences.

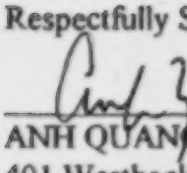
An attorney must render competent service. Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974). A lawyer must actually and substantially assist his client in deciding whether to plead guilty. Id. It is the attorney's job to provide the accused an understanding of the law in relation to the facts. Id. The attorney's advice should permit the accused to make an informed and conscious choice. Id. In other words, if the quality of counsel's service falls below a certain minimum level, the client's guilty plea can not be knowing and voluntary because it will not represent an informed choice. Id.

Here, the trial lawyer did not "assist" but he wanted "to make" the decision for Serente Cisse. When the Petitioner did not conform to his attorney's interest, the attorney withdrew from the case on the day of trial. Therefore, Serente Cisse's attorney did not meet the required minimal level, making certain that Serente Cisse's plea count not be knowingly, voluntarily and intelligently entered.

RELIEF REQUESTED

WHEREFORE, this Honorable Court is urged to grant a Writ of Certiorari, vacating Serente Cisse's guilty plea, conviction and sentence.

Respectfully Submitted:



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E-Mail: acao@loyno.edu
Attorney for Petitioner, Serente Cisse

No. 05-_____

In the
Supreme Court of the United States

SERENTE CISSE
Petitioner

v.

STATE OF LOUSIANA,
Respondent

APPENDIX

1. May 20, 2005, Ruling of the Louisiana Supreme Court.

2. February 2, 2005, Ruling of the Louisiana Court of Appeal, Third Circuit.

3 July 20, 2004, Sentence Ruling of the Fifteenth Judicial District Court for the Parish of Acadia.

Tuesday, July 30, 2004

ROBERT C. "ROBBY" BAROUSSE
Acadia Parish Clerk of Court

COURT MET THIS DATE PURSUANT TO ADJOURNMENT WITH THE HON. GLENNON EVERETT, JUDGE PRESIDING; GRACE DESHOTEL, COURT REPORTER; KIM R. HAYES, ASST. DISTRICT ATTORNEY; PAT POUSSON, BOBBY WALKER, KEVIN TRAHAN, WALTER HARRINGTON, MARK MYERS & LOIS MARTIN, DEPUTY SHEIFFS; AND JESSICA L. FRUGE, DEPUTY CLERK OF COURT AND MINUTE CLERK; BEING IN ATTENDANCE.

STATE OF LOUISIANA VS SERENTE CISSE

#55688	**POSSESSION OF MARIJUANA OVER 60 POUNDS LRS 40:0966** **AMD: POSS W/INTENT TO DISTRIBUTE MARIJUANA**
#55711	**FOLLOWING TOO CLOSE LRS 32: 0081**

TRIAL BY JURY of this matter having been set for this date finds that defendant present in open Court with retained counsel, Kenneth Privat. Kim Hayes is present and representing the State of Louisiana.

9:17 AM – Court is now called to order in the presence of prospective jurors with all parties present and represented.

9:25 AM – The jury venire is polled, with the defense counsel

waiving his presence and the presence of the defendant.

Various jurors are disqualified and excused by the Court.

The remainder of the general venire stand as generally qualified.

10:12 AM – By order of the Court and consent of all counsels, the Clerk is allowed to purge the names from the "jury box" of all those who have been previously excused, those who are not present for lack of service of notice and those who are absent and to leave only those names of the persons present and that have been generally qualified by the Court.

10:22 AM – Court back in session out of the presence of the prospective jurors with all parties present and represented.

The defense counsel files an oral "Motion to Withdraw as Counsel of Record", as to conflicting statements given to him by the defendant. Granted. The defendant now informs the Court that he will retain other counsel.

The Court now adds an additional bond of $300,000. The defendant is now informed by the Court that if he does not hire an attorney before his next trial date, he will go to trial without one.

10:40 AM – The Court informs Mr. Privat that there will be no conflict and he may re-enroll as counsel for the plea negotiations.

10:51 AM – Court back in session with the jury venire present. The Court thanks and released the jury.

The defendant now withdraws his previous plea of Not Guilty and substitutes therein a plea of Guilty to the amended charge of Possession with Intent to Distribute Marijuana. Defense counsel waives a reading of the amended bill if information. It is judicially established that the defendant's SS# 086-80-7094; DOB 1-1-6; B/M. Upon the defendant being sworn, he is questioned by the presiding judge specifically as to the voluntary nature of his plea and is advised of all rights, to: counsel, if indigent to an appointed counsel at no cost to him, plead guilty or not guilty, trial by judge or jury, attack jury venire, compulsory process, confrontation and cross examination, possible sentence and to appeal; all of which are contained in the "Plea of Guilty" form, which is read and signed by the defendant and his counsel same being filed into evidence and marked as State exhibit S-1. The defendant waives all rights as advised. The Court is satisfied that the plea is free and voluntary, that there is a factual basis for the charge, that he understands the nature of the proceedings, the consequences of his entering this guilty plea and the waiver of all rights as aforesaid. The Court also informed the accused he has two (2) years from the time the delays for appeal have expired and the sentence becomes final in which to file Post Conviction Relief. The Court accepts the plea, delays for sentencing are waived. In accepting this plea and the recommendations of the State the Court ordered the defendant to serve a term of five (5) years Hard Labor with the La. Dept. of Corrections which is suspended with the defendant being placed on three (3) years Active Supervised Probation. The Court also informs the defendant that the INS has a hold on him and must pick him up

within 48 hours. Docket #55711 is now dismissed.

A TRUE AND CORRECT EXTRACT OF THE MINUTES FOR COURT OF DATE.
(Signed)

_____

DEPUTY CLERK OF COURT
15TH JUDICIAL DISTRICT
ACADIA PARISH, LOUISIANA

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

04-1317

STATE OF LOUISIANA

VERSUS

SERENTE CISSE

Judgment rendered February 2, 2005. Applications for rehearing may be filed within the delays allowed by La. Code Civ. P. art. 2166 and La Code Crim. P. art. 922.

* * * * * * * * * * *

APPEAL FROM THE
FIFTEENTH JUDICIAL DISTRICT COURT
PARISH OF ACADIA, NO. 55688
HONORABLE GLENNON P. EVERETT
DISTRICT JUDGE

* * * * * * * * * * * *

ELIZABETH A. PICKETT
JUDGE

* * * * * * * * * * * * *

Court composed of Oswald A. Decuir, Glenn B. Gremillion, and Elizabeth A. Pickett, Judges.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.

Michael Harson
District Attorney, 15th JDC
Kim R. Hayes
Assistant District Attorney
P.O. Box 3306
Lafayette, LA 70502-3306
Counsel for:
State of Louisiana
Anh Quang Cao
Attorney at Law
401 Westbank Expressway
Gretna, LA 70053
Counsel for Defendant/Appellant:
Serente Cisse

Pickett, Judge.

FACTS

On June 19, 1998, at approximately 1:30 a.m., Deputy Gabe Fontenot of the Acadia Parish Sheriff's Department observed the defendant's car traveling extremely close to a vehicle in front of it. Fontenot executed a traffic stop for the offense of following too close, ut when he approached the defendant's car, he smelled the odor of marijuana from outside the car.

The deputy then asked for permission to search the trunk, and the defendant gave his oral consent. Upon searching the trunk, Fontenot found two duffel bags containing seventy-seven pounds of marijuana, formed into brick shapes.

The defendant, Serente Cisse, was charged by bill of information on July 15, 1998 with possession of marijuana (more than sixty pounds), a violation of La. R.S. 40:966. On October 14, 1999, the defendant filed a motion to suppress. After a number of continuances, he filed a motion to dismiss on March 24, 2003, asserting the State had failed to timely prosecute him. After a hearing on May 15, 2003, the trial court denied the motion, finding the outstanding motion to suppress interrupted the prescriptive time period. The defendant then filed a writ application with this court. In State v. Cisse, an unpublished writ disposition bearing docket number 03-750 (La.App. 3rd Cir. 7/7/03) this court denied the application.

The trial court heard the suppression motion on September 17, 2003, and denied it. The defendant entered a "best interest" guilty plea to a lesser charge, possession with the intent to distribute marijuana on July 20, 2004.

The defendant now appeals his conviction assigning two

errors.

ERRORS PATENT

In accordance with La. Code Crim. P. art. 920, all appeals are reviewed for errors patent on the face of the record.

The trial court failed to impose a probation supervision fee. Although some conditions of probation are discretionary, both La. Code Crim. . arts. 895 and 895.1 set forth certain mandatory conditions. La. Code Crim. P. art. 895 provides in pertinent part: "When the court places a defendant on probation, it shall require the defendant to refrain from criminal conduct and to pay a supervision fee to defray the cost of probation supervision[.]" We are remanding this matter to the trial court for the purpose of the trial court imposing a supervision fee in accordance with State v. Harris, 93-1098 (LA. 1/5/96), 665 So.2d 1164.

ASSIGNMENT OF ERROR NO. 1

In his first assignment, the defendant argues the trial court erred in denying his motion to suppress. In the first part of his argument, he contends Deputy Fontenot had no right to search his trunk, as he lacked either a warrant or probable cause to suspect criminal activity.

However, as observed in the procedural history, the defendant entered a plea of guilty. This court's review of the plea colloquy and the plea form reveals the defendant entered a "best interest" guilty plea, in which he did not acknowledge his factual guilt, but acknowledged that the guilty plea was ultimately in his best interest. Such a plea is allowable, pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

However, the record also reveals the defendant failed to reserve any suppression issues for review. In the absence of any such reservation of rights, a guilty plea waives all pre-plea, non-jurisdictional defects. State v. Crosby, 338 So.2d 584 (La. 1976). In State v. Allen, 99-2579 (La. App. 4th Cir. 1/24/01), 781 So.2d 88, writ denied, 01-1187 (La. 3/15/02), 811 So.2d 897, the court held that an Alford plea without a Crosby reservation left the defendant unable to seek review of the unreserved issues. Accordingly, this assignment if not properly before us.

ASSIGNMENT OF ERROR NO. 2

In his second assignment, the defendant argues the trial court erred in accepting his guilty plea because it was coerced, and because the defendant did not understand the immigration-related consequences of his plea.

He first argues his plea was coerced. Earlier on the date of the defendant's guilty plea, a jury had been selected. Subsequently, outside the jury's presence, his attorney, Kenneth Privat, withdrew as counsel of record, because of conflicting information he alleged he had received from the defendant. The court allowed Privat to withdraw. According to the defendant's brief, the court warned the defendant that he would go to trial on the next trial setting. However, the court's warning did not constitute a threat, as shown by the following colloquy:

> THE COURT: All right, Mr. Privat, you are relieved of your duties.
>
> Mr. Cisse, do you have fund to hire another lawyer, Sir, or do you need me to appoint a lawyer to

represent you?

MR. CISSE:

A I will hire one.

THE COURT: You do have funds to hire another attornye? Is that right, Sir?

MR. CISSE:

A Yes.

THE COURT: All right, Sir. We've been tap dancing around this thing for about six years. The State is anxious to go to trial, as I understand Mr. Haynes telling me that in chambers and in the presence of your counsel. I know that there is an INS hold on you presently and you live out of Parish. Under those circumstances, I am going to increase your existing bong to $300,000. You will be held in this jail until trial. I'm going to advise you to –as quickly as you can so that the process can move on right away. If you do not do so, what's going to happen is you're going to find yourself going to trial without a lawyer, and that is not in your best interest. It is best for you to have a lawyer. And if you cannot hire a lawyer, if you don't have funds to hire a lawyer, you need to let somebody know right away so that we can appoint a lawyer to represent you so that you are not prejudiced in any way. Do you understand, Sir?

MR. CISSE:

A Yes.

The colloquy shows the court did not threaten to force the defendant to go to trial without counsel. Clearly, the court offered him the opportunity to hire new counsel, or to have counsel appointed. The defendant then chose to talk to Mr. Privat off the record, and apparently decided to accept a plea offer from the State. When proceedings resumed, the following colloquy occurred:

THE COURT: Oh, has he changed his mind?

MR. PRIVAT: I'm not sure, Judge.

THE COURT: Mr. Cisse, Mr. Privat is no longer your lawyer, Sir. You told me you would find another lawyer. You have money. We're putting you in jail right now, Sir, and you'll be able to call and make telephone calls and what not so that you can get an attorney. You are held now on an additional $300,000 bond, Sir.

MR. CISSE:

A I want–I mean, I want to take the plea.

THE COURT: Sir, you can only take a plea if Mr. Hayes offers you a plea.

MR. CISSE:

A I will take the plea. If INS comes for me, I go myself, I will go.

MR. PRIVAT: They have 48 hours. Are you taking a plea?

MR. CISSE:

A Yes, if that's gooder for me.

MR. HAYES: I'm amending it to possession with intent, five years and it can be suspended. That's what I'm offering. That's been my offer for a while. Do you understand that?

MR. CISSE:

A Yes.

The court then allowed Privat to re-enroll as defense counsel. The court stated there would be no conflict problems for purposes of the plea. The court subsequently dismissed the jury and proceeded to take the defendant's plea.

We find the relevant pre-plea colloquies were not coercive in any way. Further, during the plea proceeding, the court advised the defendant that he could choose to go to trial, but that it would not be that day. The court also reminded him of his right to counsel. The defendant acknowledged his plea was not the product of threats, and was free and voluntary. There was no suggestion to the defendant that he would have to go to trial immediately and without counsel. The colloquies cited above show the court informed the defendant he would

have an opportunity to hire counsel for his next trial date. This portion of the assignment lacks a factual basis and, therefore, lacks merit.

In the second part of his assignment, the defendant argues the trial court should have informed him of the immigration-related consequences of his plea. On appeal, he alleges his guilty plea has subjected him to deportation, and that he did not understand this consequence at the time of his plea. The supreme court has stated, "possible deportation is a collateral consequence of the defendant's guilty plea and need not be explained as a requirement for a valid guilty plea. State v. Montalban, 00-2739, p. 1 (La. 2/26/02), 810 So.2d 1106, 1108, cert. denied, 537 U.S. 887, 123 S.Ct. 132 (2002).

Also, as the State's brief points out, the record indicates the defendant was aware of the INS-related consequences of his plea:

A I don't know much about the law, you know, my lawyer, that's what he do good for me, I want it. If it's gooder for me, that's why I take it. He said that's what's gooder for me. If INS come get me, they will take me to my country. If INS don't come get me, they will release me. If they take me to my country, that's fine. If they leave me here, that's fine. So he said that's gooder for me. That's why I take it. And that's what I told you. I take that.

MR. PRIVAT: I also told you that if you are convicted, you can get a minimum of ten years of prison in Louisiana. And then they would still send you to your country.

A And then I say I take the five years of probation.

Thus, for the reasons discussed, this assignment lacks merit.

CONCLUSION

The defendant's conviction is affirmed. However, the matter is remanded for the trial court to impose a supervision fee as a condition of the defendant's probation. The trial court is instructed to follow the procedure set forth in Harris, 665 So.2d 1164 if it chooses to impose the minimum fee. Alternatively, if the trial court chooses to set a higher fee, it must vacate the sentence imposed and re-sentence the defendant in open court.

AFFIRMED AND REMANDED WITH INSTRUCTIONS

SUPREME COURT OF LOUISIANA

No. 2005-K-0521

STATE OF LOUISIANA

VS.

SERENTE CISSE

IN RE: Cisse, Serente; - Defendant; Applying for Writ of Certiorari and/or Review, Parish of Acadia, 15th Judicial District Court Div. F, Nos. 55,688, 55,711; to the Court of Appeal, Third Circuit, No. 04-1317

- - - - - - - - -

May 20, 2005

Denied.

CDT
PFC
CDK
BJJ
JPV
JTK
JLW

TO BE REPRINTED

IN THE

SUPREME COURT OF THE UNITED STATES

NO: 05-230

STATE OF LOUISIANA

VERSUS

SERENTE CISSE

DOCKET NO. 55,688

FIFTEENTH JUDICIAL DISTRICT

PARISH OF ACADIA, LOUISIANA

THE HONORABLE GLENNON P. EVERETT, JUDGE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

KIM R. HAYES
ASSISTANT DISTRICT ATTORNEY
15TH JUDICIAL DISTRICT
ACADIA PARISH
P.O. BOX 288
CROWLEY, LA 70527-0288
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STATEMENT OF THE CASE

On June 19, 1998, the Acadia Parish Sheriff's Office stopped the defendant, Serente Cisse, for following too close. Upon investigating the stop and interviewing the defendant, marijuana was found in the defendant's vehicle and defendant was arrested for Possession of Marijuana with Intent to Distribute.

On September 17, 2003, a motion to suppress was tried with Judge Glenn Everett, denying the defendant's motion to suppress. Moreover, defendant's counsel sought writs to this Honorable Court challenging Judge Everett's denial of the motion to suppress, and this Honorable Court denied that particular writ. Therefore, State believes that the issue on the motion to suppress is moot and has already been ruled upon. However, out of the abundance of caution, we will still argue against the motion to suppress.

On July 20, 2004, the defendant entered a plea of guilty to the charge of Possession with Intent to Distribute. The defendant waived all of his rights correctly and had complete knowledge of the facts and circumstances as to what his sentence would be and with full knowledge of the immigration and naturalization services involvement in this case.

ASSIGNMENT OF ERROR

None.

ISSUES FOR REVIEW

ISSUE NUMBER 1

Whether or not the motion to suppress was properly denied by the trial court.

ISSUE NUMBER 2

Whether or not the defendant entered his guilty plea knowingly and voluntarily with full understanding of the consequences of his plea.

LAW AND ARGUMENT

ARGUMENT AND ISSUE NUMBER 1:

The trial court did not err in denying the defendant's motion to suppress.

On or about June 19, 1998, Officer Fontenot was working for the Acadia Parish Sheriff's Office on Interstate-10. Upon viewing the defendant's vehicle following real close to the lead vehicle, the Officer stopped the defendant. (transcript page 7). Upon seeing that a dangerous condition existed, the Officer stopped the defendant's vehicle with the intent to write a ticket. In fact, the Officer did write the defendant a ticket for following too close. (transcript page 9, 10).

Upon talking to the defendant while the defendant was in his vehicle, the Officer smelled a strong odor of raw marijuana. Upon smelling the marijuana and upon interviewing and observing the demeanor of the defendant, the Officer then asked him for permission to search his vehicle. The Officer testified that the defendant opened the trunk lid from inside the car by pushing a button on the passenger side from inside the vehicle. (transcript page 13).

The defense argues in his brief that the marijuana was not in plain view, neither by sight nor smell. It appears that the defendant is plain and mistaken as to the facts of this case. The Officer testified that he could smell the odor of raw marijuana even from outside the car before the defendant put his window down. (transcript page 12). The Officer further testified that when he initially noticed the defendant's vehicle he could not read the license plate and could not even tell what State the license plate was from. Furthermore, he testified that he could not see the defendant personally when he passed and did not know what race the defendant was until he

stopped the car and approached the defendant's window. (transcript pages 12, 13).

Furthermore, the defendant allowed the Officer to search his vehicle. The defendant acquiesced to the search and told the Officer that yes, he could search the vehicle and even opened the trunk for the Officer. Therefore, clearly this was a voluntary search by the defendant. Even so, because of the strong odor of raw marijuana emanating from the car, that became the probable cause for the Officer to search the defendant's car. Clearly this was a good search and the Honorable Judge Everett's ruling to deny the motion to suppress was correct. Moreover, Officer Fontenot video taped the stop, including the search, all of which was introduced into evidence. The video tape corroborated the Officer's testimony as to the voluntariness of the search and as to his suspicion of where the marijuana was because of the smell emanating from the car. Even under cross examination, the Officer testified that he believed he had probable cause for the felony traffic stop when he smelled the raw marijuana coming from the trunk of the vehicle as he was walking up to the defendant's vehicle. (transcript page 38). At that point, even though the defendant voluntarily allowed the Officer to search his trunk, if the defendant would not have, the State believes that the Officer had probable cause to search the vehicle and that the defendant was in custody at the time.

ARGUMENT AND ISSUE NUMBER 2:

The defendant voluntarily entered a plea of guilty on July 20, 2004, in front of the Honorable Glenn Everett, Judge presiding.

The State has copied the entire colloquy when the defendant was Boykinized by Judge Everett. As the court reviewed the plea transcript, it is

clearly shown that the defendant knew what his rights were, and waived those rights. The defendant clearly knew that he was pleading guilty to a better deal because he was scared to go to trial facing the possibility of ten to thirty years. In fact, the defendant knew that the INS's involvement was mandatory with this plea in that the defendant knew that if he pled guilty, the INS would come get him because there was an INS hold on him. The defendant was very aware of this fact for many, many months. As the Court can see, that is some of the reason why this case has taken so long to be settled. The court then found that there was a factual basis upon which to accept the plea. He also found that the defendant made a knowing and intelligent waiver of the rights previously explained and that the plea was freely and voluntarily given by the defendant. (plea transcript pages 15-18). The court then asked the defendant if the State of Louisiana and the defendant had reached an agreement on what the sentence would be. The defendant responded affirmatively and stated that that was the sentence he expected to receive.

Moreover, and most importantly, because the Judge wanted to make sure that there were no problems with this plea and that the defendant had knowledge and accepted every circumstance about this plea, the court stated "I also put on this piece of paper that you acknowledge that there is an INS hold on you and you are not free to go for at least forty-eight hours. Is that right? Do you recognize that, sir,?" The defendant answered "yes." It is crystal clear from the transcript that the defendant knew that he was pleading guilty, did so voluntarily, knew he was getting a break on the sentence for having received a suspended sentence with the amount of marijuana being so large, and also knew that he would have to deal with the INS the minute he

entered his plea. The defendant has known that all along and the plea should therefore be upheld.

RESPECTFULLY SUBMITTED,

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